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No. - .

Supreme Court, U.S.
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In the

Supreme Court of the United States.

OCTOBER TERM, 1987.

PIERRE GIRY AND STEVEN SEWARD,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented for Review.

Whether convictions of two foreign nationals for conspiracy to import cocaine into the United States may be upheld based on proof that the defendants knew that the United States undercover agents with whom they were dealing generally indicated an intent (on the part of the agents) to bring the cocaine to the United States, where the conspirators agreed only to deliver cocaine to the French West Indies and had no stake in any venture to import into the United States.

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Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinion Below.

The opinion of the Court of Appeals is reported at 818 F.2d 120 and is reproduced in the Appendix to this Petition at App. 1a-30a. Petitioners' request for a rehearing by the panel and suggestion for rehearing en banc was denied; see First Circuit Court of Appeals Order, reproduced at App. 31a.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on May 13, 1987. A timely petition for rehearing with a suggestion for rehearing en banc was denied on June 9, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provision Involved.

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutory Provisions Involved.

21 U.S.C. § 963:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 952 (in pertinent part):

> (a) It shall be unlawful *to import into the customs territory of the United States* from any place outside thereof (but within the United States), *or to import into the United States* from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter . . . [emphasis added].

Statement of the Case.

This is a petition for certiorari in an unusual case involving two foreign nationals who, on the record of this case, agreed with two undercover agents of the United States Drug Enforcement Administration (hereafter DEA) to deliver cocaine to the two undercover agents on the island of St. Martin in the French West Indies, and there to accept payment for the cocaine. They stand convicted of a conspiracy to import cocaine into the United States, based on a legal conclusion that although these two foreigners persistently refused to agree to import into the United States, that their knowledge of various general indications by the two undercover DEA agents with whom they were dealing that it was the agents' purported intent to bring the cocaine across the border and into the United States is sufficient to support their convictions.

Pierre Giry (a citizen of France) and Steven Seward (a citizen of Great Britain) were convicted after a jury trial in the District of Puerto Rico, of conspiracy to import cocaine into the United States (and two related telephone counts charged only to Mr. Giry). The charges flowed from a series of nine meetings (four of which occurred in the jurisdiction of the United States) (involving a total of roughly twenty hours) over a year's time. The participants in these meetings were primarily Mr. Giry, a

Corsican informant named Albert Crocoliche, and two undercover agents of the Drug Enforcement Administration (A (II) 367, 425). The informant, Crocoliche, disappeared before trial and was not produced.

The government's case rested primarily on the testimony of the two undercover agents. No cocaine was actually delivered, seized or offered in evidence at any time. The government's theory of the case was that Mr. Giry and Mr. Seward conspired with each other and with others (a French boat captain and unknown Colombians, not charged in the case) to import cocaine for delivery to the island of St. Martin in the French West Indies and to transfer the cocaine on the island of St. Martin to the two undercover agents who were posing as drug dealers who generally indicated to Mr. Giry and Mr. Seward that they planned to transport the cocaine to the United States for distribution.

The First Circuit Court of Appeals repeatedly recognized the petitioners' refusal to agree to a delivery on United States territory.* However, the First Circuit concluded that the convictions may be upheld because "both Giry and Seward agreed to arrange and carry out a cocaine sale after being told by agents Aponte and Mitchell of the latters' plans to import the cocaine for distribution in the New York area." (App. 8a.)

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*The petitioners filed two volumes of Appendix material, including transcripts, in the First Circuit Court of Appeals. References herein are to the Roman numeral of the particular volume of the Appendix followed by the page[s] therein (as in "A (I) page no."). Citations to the Appendix filed as part of this petition are designated "App.".

See App. 3a: [The first meeting]: "Both Giry and Seward insisted that delivery could not be made on United States territory." See App. 3a-4a: [The second meeting]: "At the hotel it was agreed that the cocaine and the cash payment would be exchanged in the French West Indies. ["This was the last meeting attended by . . . Seward . . ."].

On October 30, 1984, "the parties [Giry, meeting with undercover agent Mitchell and another undercover agent at LaGuardia in New York] made plans to consummate the deal within four to six weeks in the French West Indies." *Id.*

The defense theory of the case was, *inter alia*, that Mr. Giry and Mr. Seward were substantively and jurisdictionally entrapped* by the imprecations and pressure of the informer agent Crocoliche** and the two undercover DEA agents and,

*In a scenario reminiscent of the DeLorean case, Mr. Giry was *twice* shown ("flashed", in the vernacular) three million dollars ($3,000,000) in cash, as powerful incentive to proceed with the plan proposed by the agents (A (II) 85-97 and A (II) 117).

**The petitioners raised a claim under *Roviaro* v. *United States*, 353 U.S. 53, 77 S.Ct. 623 (1957), that the government should have produced Crocoliche, as much more than a mere "tipster," having repeatedly moved to produce him, made futile efforts to interview him, and even moved to have him arrested as a material witness (A (I) 386a). Said claim is not pressed within this petition, but a brief summary of the *Roviaro* issues is important in understanding the totality of the circumstances. The petitioners contended below that they were ensnared and entrapped by the imprecations and pressure of the informant, Crocoliche, working with the agents (or even perhaps off on a lark of his own vis-a-vis the agents) whose role was particularly critical as the "liaison" between the defendants and the agents, and as a person who spoke French, Mr. Giry's native language, which neither of the undercover agents understood. The informant does not speak English. Mr. Giry had a court interpreter for English (A (I) 129-130). The agents talked to Crocoliche in Spanish (A (I) 147-148, 241), admitted that in many instances they didn't know what Crocoliche was actually communicating to Giry (A (I) 147-148) and admitted there was a communication problem (A (I) 147). The arranging of meetings, the petitioners contended, could not under the circumstances be found to be as simple a matter as delivering messages to meet at such-and-such a place at such-and-such a time.

Said claim was effectively resolved against the defendants by the First Circuit's conclusion that Crocoliche was a mere conduit (despite the fact that he was paid $39,200 for his efforts in this investigation (A (I) 188), that the government had made reasonable efforts to produce him, and that the defendants had failed to make an adequate proffer, *i.e.*, pertinent to the issues raised in this petition, that they did not proffer that Crocoliche would offer testimony to support the proposition that the defendants did not know that the agents purportedly intended to bring the cocaine to the United States, or (inferentially) that the agents indicated some other eventual destination (App. 19a).

The defendants, without the production of Crocoliche, were barred from raising their entrapment defenses and prevented from proving that they had no predisposition toward or actual intent to impact the United States and no stake in any United States venture.

The Court below did not address the potential for agents to use such an informant to entrap, leaving their own actions looking relatively benign on the

most importantly, that they had no intent to impact the United States and did not agree to do so. Nor did the defendants have any interest in, specific knowledge of, or participation in, what the undercover agents (the would-be buyers) would do with the cocaine after the transaction was complete on the island of St. Martin.

COURSE OF PROCEEDINGS.

On February 13, 1985, a federal grand jury sitting for the District of Puerto Rico returned a three-count indictment, charging Pierre Giry and Steven Seward, in Count One, with a conspiracy to import cocaine into the United States (in violation of 21 U.S.C. §§ 952 and 963). Counts Two and Three of the indictment charged Mr. Giry alone with use of the telephone to facilitate the conspiracy charged in Count One (in violation of 21 U.S.C. § 843(b)).

The undercover agents, active in the case since its inception (along with the informer "Albert") obtained an arrest warrant for Mr. Giry from the Magistrate in Puerto Rico (A (II) 51). They told the authorities in the Dominican Republic that Mr. Giry was there in connection with a drug deal and that they had an arrest warrant.* Giry, alone, met with the agents in

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record, and then to erase all evidence of the entrapment by the simple disappearance of the agent/entrapper right before the trial. One of the agents testified that as soon as the arrest was made, "As far as I was concerned, at that time he [Crocoliche] could go." (A (I) 236.) Go, he did. Thus a sophisticated technique of basic unfairness becomes unreachable and capable of repetition.

*At the time that the agents made this representation to the authorities in Santo Domingo, they had been made aware by the informant, Albert Crocoliche, that the cocaine which was supposedly coming from Colombia by boat had been apparently dumped overboard when the boat came in contact with a Coast Guard Cutter off the coast of Colombia (A (II) 133-136, A (I) 218, 347-358). Thus, they knew that no transaction was actually about to occur on St. Martin or anywhere at that time.

Santo Domingo and told them that the cocaine was lost (A (II) 51). The next day Giry was to leave Santo Domingo and fly to his home on St. Barts (A (II) 355). Giry was declared "persona non grata" by the Santo Domingo authorities and orders came down to have him expelled from Santo Domingo (A (II) 51, A (I) 359-360). When he arrived at the airport he was arrested by the Dominican authorities, strip searched, and forcibly put on a plane to Puerto Rico* (A (II) 52). DEA Agent Mitchell had purchased Mr. Giry's ticket. Mr. Giry was arrested upon his arrival in Puerto Rico on February 4, 1985 (A (II) 52, 143).**

Mr. Seward was brought before the court in Puerto Rico pursuant to a writ of habeas corpus ad prosequendum issued because he was in custody on marijuana smuggling charges in the District of Connecticut.***

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*The United States, at the time of this action, had a valid and bona fide treaty with the Dominican Republic governing the extradition of defendants in criminal cases between the two countries. Treaty of June 19, 1909, 36 Stat. 2468; Treaty Series 550. That treaty did not include extradition for drug offenses. Petitioner Giry below unsuccessfully raised claims that he had been kidnapped from Santo Domingo, and of lack of jurisdiction over his person under *United States* v. *Toscanino*, 500 F.2d 267 (2d Cir. 1974). The claims were rejected by application of the rule of *Ker* v. *Illinois*, 119 U.S. 436, 7 S.Ct. 225 (1886) and *Frisbie* v. *Collins*, 342 U.S. 519, 71 S.Ct. 509 (1952), and a conclusion that the actions taken were not sufficiently "egregious" (a curious test of constitutional powers or rights, but petitioners do not press the point in this petition, recognizing the limitations of *Toscanino*).

**Mr. Giry contended unsuccessfully below, that the Agents acted in violation of the Mansfield Amendment, 22 U.S.C. § 2291(c)(1), which provides that "No officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts, notwithstanding any other provision of law. This paragraph does not prohibit an officer or employee from assisting foreign officers who are effecting an arrest." It is unclear whether § 2291(c)(1) places any limits on United States drug agents professedly "assisting" foreign officers.

***Although it may appear illogical at first glance, there is no lack of coherence or symmetry with respect to Mr. Giry and Mr. Seward's contentions that they actively avoided and intended to avoid commiting offenses against the

After a four day trial, both defendants were convicted of the conspiracy, and Mr. Giry was convicted on all three counts. Mr. Giry was sentenced (1) On Count One, to imprisonment for twenty (20) years and a fine of $200,000; (2) on Count Two, to imprisonment for a period of four (4) years and a fine of $25,000; and (3) On Count Three, to imprisonment for a period of four (4) years and a fine of $35,000. Said terms of imprisonment are to be served consecutively to each other (for a total of twenty-eight [28] years' imprisonment). A Special Monetary Assessment in the amount of $50.00 as to each count was also imposed. Mr. Seward was sentenced to imprisonment for ten (10) years and a fine of $20,000. Said term of imprisonment is to be served consecutive to a term of nine (9) years imprisonment imposed in another case (involving marijuana charges) in the United States District Court for the District of Connecticut. A Special Monetary Assessment in the amount of $50.00 was also imposed.

The petitioners appealed to the First Circuit Court of Appeals; their appeal was denied. A Petition for Rehearing With a Suggestion for Rehearing En Banc was filed on May 27, 1987 and denied by order entered June 9, 1987 (App. 31a).

Reasons Why the Writ Should Be Granted.

This case presents an important question of federal law that has not been, but should be, settled by this Honorable Court:

United States with respect to any *cocaine* importation, where the record shows some impact on the United States with respect to a previous and separate instance of marijuana dealing, where the United States courts are known to consider cocaine offenses considerably more grave and punish them much more severely. A smuggler of one form of contraband is not, by definition, or historically, necessarily a smuggler of *any* form of contraband.

whether two conspirators (foreign nationals) who reside and operate outside the United States and agree to import contraband into a foreign country may be convicted of agreeing to import into the United States because the two United States undercover agents with whom they are dealing generally indicate to them that it is their (the undercover agents) intent to eventually bring the contraband to the United States? It is a question of first impression.* This Court has not previously addressed the question whether the statutory language of 21 U.S.C. §§ 952 and 963 requires as an element of the crime a specific intent with respect to the United States and/or whether under such unusual facts and circumstances, knowledge of two undercover agents' purported intent in that regard will suffice as proof of such intent. In other words, may a conclusion that there is a "chain" conspiracy, in fairness, be found where the transaction ends across the border and the defendants have no stake in the further movement of the contraband?

Argument.

For defendants to be convicted of conspiracy under 21 U.S.C. § 963, the government must prove the existence of a

*So far as counsel has been able to ascertain, the only truly close case on the facts is *United States* v. *Schmucker-Bula*, 609 F.2d 399 (7th Cir. 1980). Schmucker was a foreign national convicted of a conspiracy to import cocaine into the United States. The record reflected that at one point he refused to make delivery outside Colombia. However, Schmucker's co-defendant mailed a packet of sample cocaine directly to Chicago. Further, Schmucker was thoroughly involved in negotiations with respect to transport of the cocaine (by sea or by air) directly to the United States. 609 F.2d at 401. The Seventh Circuit distinguished Schmucker's situation from that of one who agrees to or attempts to sell the drugs to United States agents overseas, which is the case here.

knowing and willful agreement. Here, the First Circuit Court of Appeals has dispensed with the requirements of knowledge and willfulness, finding the convictions sound, based on general indications by the undercover agents to the defendants supporting inferences that it was the purported buyers' intent that the ultimate distribution would be in the United States. That knowledge, concluded the First Circuit, is enough. Analogizing to cases involving *domestic* distribution and manufacturing "chains", the court below has taken a giant step in defining the concept of a chain conspiracy, stretching it to include a conspiracy ending outside the border, where the conspirators (these petitioners) had no stake in the venture beyond that point outside the border.

A. There Is No Dispute That the Delivery and Exchange of Payment for the Contraband Was to Occur Outside the United States.

The government's case at trial rested almost exclusively on the testimony of the two undercover DEA Agents. The critical "liaison" man, Albert Crocoliche, was assertedly nowhere to be found. One agent, testifying for the government, offered testimony that at their first meeting in the French West Indies, the defendant Seward was asked about importing cocaine to Puerto Rico or the Virgin Islands, to which Mr. Seward responded, ". . . no, definitely not." (A (II) 74.) The same agent testified that later that same evening he asked Mr. Giry if he would deliver cocaine to the United States, and that Giry "refused" (A (II) 80).

The only conspiratorial agreement in this case was consummated at a meeting in Puerto Rico on March 9, 1984. One of the undercover agents testified at trial, describing that negotiation as follows:

A. Okay, so basically we finally came to the agreement that Agent Aponte would be allowed to travel to the French West Indies, either St. Bartholomew or St. Martin.

Once the cocaine — this was [would be] in response to having learned that the cocaine had finally arrived in one of those two islands [St. Martin or St. Bartholomew]. Agent Aponte would be allowed to see the cocaine, to weigh it and to test it.

Once Agent Aponte was satisfied that it met the requirements of weight and purity he would then place a phone call to me. I would fly in a private aircraft to an airport in St. Martin in the French West Indies called Grand Paz and when I arrived there Agent Aponte would be given control of the cocaine and I would turn over control of the money to Mr. Giry.

We finally agreed upon that.

(A (II) 92; emphasis added.)

Giry and Seward would not agree to deliver cocaine to Puerto Rico (A (II) 336), they would not agree to deliver cocaine to the Virgin Islands (A (I) 211-214, A (II) 74-75, 82-83, 96, 119, 331-338, 345-346), and they refused to take cocaine to the United States (A (II) 172, 336-337).

The nexus between the defendants' activity and the element of importation into the United States is, on this record, too tenuous and indirect, and application of 21 U.S.C. §§ 952(a) and 963 to their activity goes beyond the plain language of the statutes and the intent of Congress. A conviction for conspiracy to violate 21 U.S.C. § 952(a) requires an intent to import *into the United States*. The government has failed to

show that Mr. Giry and Mr. Seward intended to violate the substance of the statute, *i.e.*, that they intended to import into the United States or to commit a crime in United States jurisdiction.

B. The Statutes Charged Require Proof of Knowing and Willful Intent to Impact the United States.

This Court concluded in *Pereira* v. *United States*, 347 U.S. 1, 12, 74 S.Ct. 358, 364 (1954), that "[i]t is fundamental that a conviction for conspiracy . . . cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.'" *See United States* v. *Flaherty*, 668 F.2d 566, 580 (1st Cir. 1981), holding that in a conspiracy case the government must prove beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute. Two types of intent must be proved: intent to agree and intent to commit the substantive offense. *See also, e.g.*, *United States* v. *Borelli*, 336 F.2d 376, 384 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965) (the gist of the offense of conspiracy is the agreement between the parties and it is necessary to determine what kind of agreement existed between them) (Friendly, J.); *United States* v. *Bright*, 550 F.2d 240, 241 (5th Cir. 1977) ("The essential elements of a criminal conspiracy are an agreement among the conspirators to commit an offense against the United States attended by an overt act of one of them in furtherance of the agreement"). The First Circuit in utilizing the verbal ruse of the agents to transfer intent to these defendants, as links in a chain conspiracy, relied on conspiracy cases dealing with *domestic* manufacturing and distribution chains and as a matter of first impression, extended the rationale of those cases to this agreement, ending outside the United States, involving charges requiring specific intent to impact the United States.

However, as the First Circuit recognized, "The characterization of the vertical network as a single chain rests upon the interdependent nature of the enterprise. Each participant's financial gain depends upon the successful accomplishment of all the illegal links in the chain . . ." (App. 12a). Here the record will not support a finding of such interdependence (and there is no such direct finding) or a conclusion that any interests of Mr. Giry and Mr. Seward in any way depended on successful accomplishment of any of the links in a chain that purportedly would lead to the United States.

It is a dangerous expansion of the law of conspiracy to impute an agreement to touch upon the United States to two foreign nationals, operating outside the United States and intending to do so, based only on the testimony of two undercover agents that they told the conspirators that it was their (the undercover agents') intent to eventually touch upon the United States, where the foreign nationals have no specific knowledge of and no cognizable stake in any subsequent sale of the contraband in the United States. Mr. Giry and Mr. Seward had no willfullness to commit the crime charged against them.

Nor is the record clear and unequivocal that Mr. Giry and Mr. Seward "knew" that the cocaine was ultimately intended for the United States. Mention of the United States as an ultimate destination occurred exactly twice in all of the meetings and contacts, and both times it occurred in the context of the agents pressing Mr. Giry that for the price Mr. Giry was asking, the would-be buyers were asserting that *he* ought to transport the product to the United States. On the first occasion, one agent represented to Mr. Giry that they were "representatives of an organization in the New York, Connecticut and New Jersey area interested in distributing in the New York area" (App. 3a) in the context of a conversation where he was trying to get Mr. Giry, based on the price being suggested, to agree to deliver to United States territory. On the second occa-

sion, the other agent was pressing Mr. Seward regarding the price when he suggested delivery to Puerto Rico or the Virgin Islands. Both times the answer was no (A (II) 74-75; 79-80). Agreement cannot be inferred from mere knowledge of *another's* general indications of intent. The *defendant's* state of mind is the relevant consideration where the statute requires specific criminal intent. *Cf. United States* v. *Pentapati*, 484 F.2d 450, 451 (5th Cir. 1973). There the defendant was convicted of importing marijuana. He had left his plane in Miami and a lawful customs search netted cocaine. The defense was that he intended to depart the United States immediately. In his possession at the time of the arrest was an open-ended ticket to London and a ticket, dated the day of the arrest, for Chicago. The Court concluded that 21 U.S.C. § 952(a) (the substantive offense) "looks to the fact of bringing a narcotic within the territorial jurisdiction of the United States, and not to the alleged importer's subsequent plans," *citing Daut* v. *United States*, 405 F.2d 312 (9th Cir. 1968), *cert. denied*, 402 U.S. 945 (1971) and *United States* v. *Morello*, 250 F.2d 631, 632, 635 (2d Cir. 1957). A conspiracy charge under 21 U.S.C. § 963 must look to the agreement to bring the drug within the territorial jurisdiction of the United States.

It is well established that in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the government must prove at least the degree of criminal intent necessary for the substantive offense itself. *Ingram* v. *United States*, 360 U.S. 672, 678, 79 S.Ct. 1314, 1319 (1959). *See Pettibone* v. *United States*, 148 U.S. 197, 13 S.Ct. 542 (1893). Here the substantive statute requires an intent towards the United States. The conspiracy statute thus requires the same intent.

Furthermore, this case presents the infrequent situation in which reference to the knowledge of the parties to an illegal agreement is necessary to establish the existence of federal

jurisdiction. Where the substantive offense requires knowledge and willfulness, obviously the conspiracy must also require such a state of mind. *See United States* v. *Bennett*, 665 F.2d 16, 24 (2d Cir. 1981) (defendants convicted of conspiring to violate 18 U.S.C. §§ 2312, 2313, 2314 and 2315. Because each section, dealing with stolen property, requires knowledge as to the stolen goods by the defendants, the conspiracy convictions were reversed). *See generally United States* v. *Conroy*, 589 F.2d 1258, 1270 (5th Cir.), *cert. denied*, 444 U.S. 831 (1979).

Conroy, supra, involved convictions for either conspiracy to import marijuana or both conspiracy and attempting to import marijuana. The charges flowed from the boarding of an American boat loaded with marijuana in Haitian waters. One defendant, Walker, was on the boat at the time of the boarding. The Fifth Circuit addressed the sufficiency of the evidence as to Walker who, the evidence showed, loaded marijuana aboard the boat but contended that there was insufficient evidence to establish that he had knowledge of a conspiracy to import marijuana directed at the United States. He maintained that he believed the boat was bound for Canada. The Fifth Circuit stated that:

> [i]f it be assumed that Walker indeed planned only to cooperate in the export of marijuana to Canada, there would be no criminal intent on his part cognizable in an American court and no federal interest involved. The importation of marijuana into Canada may or may not violate Canadian law. *Even if it does, the question may be raised whether Congress has the power, as a matter of due process, to make criminal a conspiracy entered into abroad directed only against another foreign country.* We need not reach that question here for Congress has shown no

> intention even by remote implication to punish a person who in some other nation conspires against the laws of a third nation.

Conroy, 589 F.2d at 1269-1270. On this record, any "Giry/Seward boat" or transport of any contraband having a nexus with Mr. Giry and Mr. Seward was plainly bound for the island of St. Martin and they had absolutely no involvement in any further transport or acts in support thereof.

The issues underlying this unusual case are significant in terms of public policy and careful consideration of the role of United States law enforcement officers acting outside the territorial boundaries of the United States. To date, there has never been a time when United States authorities exercised governmental powers in any geographical area — whether at war or in times of peace — without regard for their own Constitution. *Ex parte Milligan*, 71 U.S. 2 (1866). The Tentative Draft Restatement of Foreign Relations Law, § 721 (of the present draft) states:

> The provisions of the Constitution safeguarding individual rights generally govern the United States government . . . and generally limit governmental authority exercised abroad . . ., whether such authority is exercised unilaterally or by international agreement.

Restatement of the Foreign Relations Law of the United States (Revised), Tentative Draft No. 6, at 529, § 721 (1985). As a matter of law and policy, the agents in this case had no authority or power to take any action inconsistent with the requirements of the Constitution. Their efforts in persistently importuning

Mr. Giry and Mr. Seward to agree to deliver cocaine to the United States, which they persistently refused to do, and then the continuing utilization of the verbal ruse that they (the agents) themselves intended to import the contraband to the United States, under the circumstances, violates the agents' mission as protectors of the borders and territory of the United States and Due Process, as do these convictions.* *See Hampton* v. *United States*, 425 U.S. 484, 96 S.Ct. 1646 (1976). The case as it stands is a paradigm of jurisdictional entrapment. *United States* v. *Archer*, 486 F.2d 670, 681-682 (2d Cir. 1973).

The undercover officers herein had invested considerable effort in ensnaring Mr. Giry and Mr. Seward in a crime against the United States as defined by the plain language of the statute, but could not, as the prosecutor virtually admitted in his closing argument, induce them to "act like men" and commit a crime against the United States.** What has been forgotten or ignored in this case is that no crime against the United States, under this statute, ostensible or otherwise, would have occurred but for the creative design of these agents.*** It cannot be perpetually

* There is clear precedent for the application of Fifth Amendment Due Process guarantees to foreign nationals abroad. *See United States* v. *Tiede*, Crim. Case No. 78-001A (U.S. Ct. for Berlin, March 14, 1979), reprinted in 86 F.R.D. 227 (1979) (a criminal proceeding in a United States occupation court in Berlin against two East German nationals who had diverted a Polish airliner from its scheduled landing in East Berlin to a landing in West Berlin).

** The First Circuit observed that the prosecutor in closing, improperly argued to the jury, calling Giry and Seward "cowards" for refusing to deliver the cocaine on American territory and arguing a theory of transferred intent, i.e., that Giry was like a man who threw a stone into a crowd and then denied having the intention of "hitting that man in particular" (App. 24a) (finding no plain error). In so arguing, the prosecutor implicitly recognized Giry's lack of intent toward this country.

*** *But see* 21 U.S.C. § 949, which reaches acts of distribution of controlled substances committed outside the territorial jurisdiction of the United States where the offender intends that the substance will be imported into the United States or knows that the substance will be unlawfully imported into the United States.

assumed that foreign purveyors of cocaine (whether dealing with purported United States mobsters or using U.S. dollars or not) focus exclusively on the United States as a market. The substance has international appeal, and citizens of the United States are not the only consumers of cocaine in the world. Certainly it cannot be assumed on the record of this case that Mr. Giry and Mr. Seward aimed at the United States, given the severe penalties attached to cocaine offenses by United States authorities, where they plainly refused to do so.

Most importantly, it is the job of United States law enforcement officers to reasonably protect the borders of the United States, but it is not our job (nor should it be) to police the world (or the Caribbean, for that matter) for drug violators. Recent United States interdiction policy has properly recognized the importance and necessity of demanding that other countries take some responsibility for what is occurring within their own territories. There is a vital difference between international cooperation in the interdiction of drugs and subjecting foreigners intending to operate in a foreign sphere to convictions in United States courts by a process of imputing to them the knowledge and intent of United States drug enforcement agents acting undercover.*

* International agreements for cooperation in controlling the international traffic in drugs recognize this principle. For example, The Commentary to the Single Convention on Narcotic Drugs, 1961, prepared by the Secretary General of the United Nations, reiterates strongly the proposition that the introductory language of Article 36 (the article erecting a framework for the prosecution of drug offenses), paragraph 2, subjects the obligations created by the article to "the constitutional limitations of a Party, its legal system and domestic law."

For example, the Commentary expressly states that no party need prosecute pursuant to subparagraph (a), clause (iv) actions of illicit traffic committed abroad if its law generally limits its criminal jurisdiction to offenses committed in its own territory. Commentary to paragraph 2, introductory subparagraph, at 430, 435 (English language edition). *Also see In re Grand Jury Proceedings*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) (stating that "a country's obligations to cooperate under the Single Convention are governed by its own domestic law"). *Id.* at 831.

Where the investigation indicated that the targets had a strong predisposition (bordering on an obsession) with staying away from the United States and its borders, the agents might well have properly refocused their energies on less flamboyant cases, concededly involving less exciting international travel and amenities, but devoting scarce resources to the many out there who plainly have no reservations whatsoever about involving themselves in chains leading directly to the borders of this country.

C. Mr. Giry and Mr. Seward, As Foreign Nationals, Plainly Did Not Know That Their Actions Amounted to a Crime Against the United States and Evidenced an Intent Not to Commit a Crime Against the United States.

The venerable Justice Learned Hand concluded that "to permit conspiratorial liability where the conspirators were ignorant of the federal implications of their acts would be to enlarge their agreement beyond its terms as they understood them." He capsulized the distinction in what has become well known as his 'traffic light' analogy (*quoted in United States* v. *Feola*, 420 U.S. 671, 689, 95 S.Ct. 1255, 1266 (1975)):

> While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past.

United States v. *Crimmins*, 123 F.2d 271, 273 (2d Cir. 1941).

Pierre Giry and Steven Seward cannot be guilty of conspiring to import into the United States where there is no proof that they supposed that by their actions (in agreeing to engage in a transaction on the island of St. Martin) they were running any such "traffic light." In truth, the evidence supports the contrary conclusion. As foreign nationals, the record supports a conclusion that they conceived of themselves as absolutely taking care to observe the "traffic" rules.* This Court may soundly condemn as immoral an agreement to deliver contraband to the French West Indies (or anywhere else in the world outside the United States), but such agreement is not a violation of United States law under 21 U.S.C. §§ 952(a) and 963.

It is improper to find conspiratorial liability where the parties to the illicit agreement were not aware of the facts giving rise to the jurisdiction of the United States federal court. Persons cannot be punished for acts beyond the scope of their agreement. Unlike an assault on a federal officer (as in *Feola, supra*), where the man or woman is assaulted, regardless of the intent, the legal character of an importation of contraband into the French West Indies is different from an importation of contraband into the United States. The agreed-upon destination of the contraband and the situs of the completion of the transaction alters the legal character of the acts agreed to.

The four cases relied on by the First Circuit are distinguishable from the present case as in each one the evidence was clear that defendant had (and knew he or she had) a clear stake in the ongoing venture in the United States. The First Circuit relied primarily on *United States* v. *Cordero*, 668 F.2d 32 (1st

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*This Court may conclude that they were driving so recklessly as to be unable to perceive the light, or thinking that they were observing all the rules, failed to notice the light, but it cannot be concluded in fairness (as the First Circuit's opinion has done) that they were aware that the light was, in fact, "red" and determined to run it.

Cir. 1981) in upholding these convictions. These two defendants are totally unlike the defendant in *Cordero*, 668 F.2d at 40-41, who made it "clear" in two taped conversations that she was clearly aware that the cocaine was to be transported by airplane from Guadeloupe to San Juan, Puerto Rico. *Id.* The record here contains no evidence as to any details or particulars of transport of the substance after its arrival in the French West Indies. The agreement in *Cordero* was to smuggle cocaine into Puerto Rico. 688 F.2d at 35. Giry and Seward expressly and repeatedly refused to participate in any such plan. In *Cordero* there was evidence that the defendant Cordero was a "full partner" in the enterprise to distribute in the United States with Sorren, Jiminez (the agent) and the others. The total amount of money owed for the transaction would not be paid until delivery in Puerto Rico. *Id.* at 41. Thereafter, Cordero was promised a three-way split of the money, depending upon and the direct result of the distribution in the United States. *Id.* at 40. Mr. Giry and Mr. Seward were to receive complete payment in the French West Indies, regardless (A (II) 119). After the transporting of the cocaine to St. Martin in the French West Indies, Mr. Giry and Mr. Seward could receive "their reward, and be done with the scheme" (quoting from *United States* v. *Rodriguez*, 585 F.2d 1234, 1245 (5th Cir. 1978), *aff'd*, 612 F.2d 906 (en banc) (5th Cir. 1980), *aff'd sub nom. Albernaz* v. *United States*, 450 U.S. 333 (1981)) (where the court reversed the convictions of conspiracy to distribute of two defendants who had not specifically made arrangements to participate in the distribution of the marijuana).

United States v. *Rose*, 590 F.2d 232 (7th Cir. 1978), *cert. denied*, 442 U.S. 929 (1979), a second case on which the First Circuit relied, involved two defendants who had agreed to burglarize a home in Arizona and to transport the stolen goods to Illinois, who had unwittingly engaged FBI agents to perform the theft and to transport the goods. The agents never intended

to commit the thefts and no goods were ever stolen; instead the defendants were arrested and convicted of conspiracy to transport goods interstate knowing the goods to be stolen. The issue of federal jurisdiction was not expressly raised. No question of extraterritoriality was implicated. The court observed that "the defendants' plan sufficiently impinged on an area of federal concern to justify federal regulation and prohibition." In *Rose*, the defendants' plan plainly envisioned interstate criminal actions (on United States territory) and plainly the conduct they had agreed upon included all of the elements of the substantive crime. Here, the defendants' plan did not include touching upon United States territory and their agreement did not include the element of such intent. Illegal activity actually intended to take place outside the territorial jurisdiction of the United States without evidence of a direct stake in impacting the United States does not sufficiently impinge on an area of federal concern to justify federal prohibition, under the rare circumstances of this case.

A conclusion that these two foreign nationals may be convicted based on a "chain" conspiracy theory in which a participant in part of the conspiracy may be convicted of participation in the whole is a question-begging argument. The issue is whether a jury could reasonably infer that two foreigners, residing and intending to act outside the United States, and agreeing to import a contraband substance to the French West Indies, knowingly and voluntarily joined a conspiracy on the part of two would-be buyers to further import the substance from the French West Indies to the United States, in which further importation they had no stake or interest and shared no part.

D. UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, AN ESSENTIAL ELEMENT* OF A CHARGE OF IMPORTING COCAINE INTO THE UNITED STATES CANNOT BE SATISFIED BY REFERENCE SOLELY TO THE STATE OF MIND OF THE DEFENDANTS WHERE THAT STATE OF MIND IS IMPUTED FROM KNOWLEDGE OF THE PURPORTED INTENT OF TWO UNDERCOVER AGENTS.

See United States v. *Feola*, 420 U.S. 671, 695-696, 95 S.Ct. 1255, 1269-70 (1975), where the Court held that two defendants could be convicted of conspiring to violate the federal statute, 18 U.S.C. § 111, which prohibits an assault on a federal officer (even though defendants did not intend to assault a federal officer) because there was a "sufficient threat" to an "area of federal concern" to meet the federal jurisdictional requirement as long as a federal officer *was in fact the target of the planned attack*. 420 U.S. at 695, 95 S.Ct. at 1269. Under the principles of *Feola*, the defendants' convictions in this case are unlawful; the United States was not the target of Mr. Giry and Mr. Seward's plan. These two foreign citizens cannot be fairly charged with sufficient knowledge of United States conspiracy law to perceive that they were committing a crime against the United States by agreeing to deliver contraband to the French West Indies, even if (*arguendo*) they had reason to believe that their would-be buyers had intentions

* Petitioners have consistently contended that the intent to impact the United States element is "jurisdictional" and substantive. The requirement is necessary for proper jurisdiction and an element of the offense which Congress intended to describe and to punish, and which must be proved beyond a reasonable doubt. *Cf. United States* v. *Gipe*, 672 F.2d 777 (9th Cir. 1982) holding that because possession of intoxicants is prohibited only in Indian country, the locus of the act of possession constitutes an element of the crime, and reversing the defendant's conviction in view of the district court's failure to apply the beyond a reasonable doubt standard in determining that the site of the offense was not a non-Indian community.

toward the United States. They were indifferent to those intentions. No court has previously extended the concept of a chain conspiracy to an agreement ending outside the border in the manner of this case.

Furthermore, these convictions are not supported by the values underlying the law of conspiracy. The law of conspiracy serves dual purposes: The first is protection of society from the dangers of concerted criminal activity. *Dennis* v. *United States*, 341 U.S. 494, 573-574, 71 S.Ct. 857, 899-900 (1951) (Jackson, J., concurring). In the context of this case, to define "society" as "the world," or "the Caribbean" assumes too great a burden. *Cf. United States* v. *James-Robinson*, 515 F.Supp. 1340 (S.D. Fla. 1981), where the court rejected the government's argument that no nexus with the United States need be alleged to assert jurisdiction over foreign crewmembers arrested on a stateless vessel 400 miles from the United States, properly defining the protective principle to permit jurisdiction over foreign nationals only when their conduct threatens the state's security or governmental functions. *Id.* at 1345. Such effects have traditionally been limited to those directly implicating the ability of the state to protect itself and/or to conduct its governmental operations, *e.g.*, acts against the sovereign as opposed to acts against the citizenry or conduct which complicates law enforcement ability.

Here the court has imputed the intent of the agents to the defendants with respect to a conspiracy not merely beginning outside the border, but *ending* outside the border. A chain conspiracy may have no limits by this logic. Can a man importing marijuana from Colombia to France be held guilty of a crime against the United States if any portion of that original importation actually wends its way to the United States? What if the substance goes to ten different countries? Is he guilty of a crime in all ten countries? More pertinently to this case, can a person importing cocaine from the Caribbean to France be

found guilty of a United States crime if a United States undercover agent in France tells a French importer that it is *his* intent to further transport some of it to the United States?

The second aspect of the law of conspiracy is that it is an inchoate crime, serving the concept that at some point, the likelihood of the commission of an illegal act is sufficiently great and the criminal intent is sufficiently well formed to justify the intervention of the criminal law. Here, the crystallization of intent needed to carry out the substantive offense (which was, in fact, an importation to St. Martin) did not result in the intent needed to carry out a substantive offense of importation into the United States, and is, under United States law (and particularly the statute applied to these petitioners), less blameworthy and constitutes less of a danger because it was not intended by them to bring the contraband cross the border or to participate in that transport.

The agents in this case could have just as easily told Mr. Giry and Mr. Seward that they planned to take the contraband to Europe, and it would not have had any effect whatsoever on the agreement entered into or the actions (and inactions) which occurred. These defendants must rest on the record, where the First Circuit has resolved the matter of the missing "Albert Crocoliche" against them, their defenses could not be fully and fairly developed.

In *Direct Sales Co.* v. *United States*, 319 U.S. 703, 63 S.Ct. 1265 (1943), a drug manufacturer and wholesaler had supplied large amounts of morphine sulphate to a doctor for several years. The government charged the manufacturer with conspiracy to distribute narcotics unlawfully because the amounts of morphine supplied were so large that the manufacturer must have known that the doctor was distributing them illegally. The Court held:

> When the evidence discloses such a system, *working in prolonged cooperation* with a physician's unlaw-

> ful purpose to supply him with his stock in trade for his illicit enterprise, there is no legal obstacle to finding that the supplier *not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible*. The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. *There is informed and interested cooperation, stimulation, instigation, and there is also a "stake in the venture"* which, even if it may not be essential, is not irrelevant to the question of conspiracy.

319 U.S. at 713, 63 S.Ct. at 1270 (footnote omitted and emphasis supplied).

Also cf. United States v. *Falcone*, 311 U.S. 205, 61 S.Ct. 204 (1940) (stressing that more than a disinterested knowledge that goods supplied may be put to an unlawful use is required to convict a defendant of participating in a conspiracy to distribute). Criminal substantive due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). It was irrational for the jury to infer a conspiracy to import cocaine into the United States on the part of these two petitioners on the record of this case.* Here,

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* It is more likely than not that it is not truly possible to cure the effect on a jury sitting in San Juan, Puerto Rico of argument by the prosecutor that Giry was "like Peter who for the third time denied Christ" (see App. 23a) and that the defendants were like two individuals "who agree to kill the judge" (but fail in their effort because the gun doesn't work) (App. 24a) (The First Circuit found no plain or harmful error, although concluding that the remarks were improper. The particular remarks about Peter's denial of Christ, the Court observed, were

there was no working in prolonged cooperation. The knowledge of a venture impacting on the United States was general and vague, but no steps, negotiations or even conversations were engaged in by the petitioners to make that accomplishment possible. There was no more than acquiescence, carelessness, and indifference. There is no evidence of a stake in the agents' purported plan. There is a plethora of evidence of firm intent not to break the laws of the United States. In the face of wrong-doing which is not within the parameters of the law as charged and tried, the Court should preserve the rule of law.

Conclusion.

For all the foregoing reasons, petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit.

Respectfully submitted,

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deliberate, unprovoked, and an irrelevant and inflammatory appeal to the jurors' private, religious beliefs, but found the prejudice cured, although possibly not neutralized, by the judge's instructions (App. 26a-27a).

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UNITED STATES of America, Appellee,

v.

Pierre Michel Henri GIRY and Steven Seward, Defendants, Appellants.

No. 86-1487.

United States Court of Appeals,
First Circuit.

Argued March 3, 1987.
Decided May 13, 1987.
As Amended May 26, 1987.

Two defendants were convicted of conspiracy to import cocaine into the United States and one defendant was also indicted and found guilty on counts of using communication facilities to effectuate conspiracy, in the United States District Court for the District of Puerto Rico, Juan M. Perez-Gimenez, J. Defendants appealed. The Court of Appeals, Pettine, Senior District Judge, sitting by designation, held that: (1) government agents' participation in conspiracy did not negate existence of conspiracy charged; (2) United States' failure to produce confidential informant did not deprive defendants of fair trial; and (3) sentence based upon statutory amendment which became effective during running time of conspiracy was not prohibited by ex post facto law of Constitution.

Affirmed.

. . . . . .

James W. Lawson with whom Lillian A. Wilmore and Oteri, Weinberg and Lawson, Boston, Mass., were on brief, for appellants.

Jose A. Quiles, Asst. U.S. Atty., with whom Daniel F. Lopez Romo, U.S. Atty., Hato Rey, P.R., was on brief, for appellee.

Before COFFIN and TORRUELLA, Circuit Judges, and PETTIINE,* Senior District Judge.

PETTINE, Senior District Judge.

This is an appeal from convictions of conspiracy to import cocaine into the United States. The appellants, Pierre Giry ("Giry") and Steven Seward ("Seward") were indicted by a federal grand jury in the District of Puerto Rico on one count of conspiracy to import approximately 135 kilograms of cocaine into the United States, in violation of 21 U.S.C. sections 952 and 963. Giry was also indicted on two counts of using communication facilities to effectuate the conspiracy, in violation of 21 U.S.C. section 843(b). Following a four-day trial in February, 1986 a jury returned verdicts of guilty on all counts charged. On April 30, 1986 Giry was sentenced to serve a total of 28 years in prison and to pay a $250,000 fine, and Seward was sentenced to serve 10 years in prison and to pay a $20,000 fine.

The appeal from these verdicts and sentences raises four issues: whether the evidence was sufficient to find the appellants criminally liable for a conspiracy to import cocaine into the United States; whether the United States' failure to produce a confidential informant deprived the appellants of a fair trial; whether the prosecution's closing argument deprived the appellants of a fair trial; and whether the district court applied the appropriate penalty statute in setting Giry's prison term. For reasons stated herein, we have found that none of these questions can be answered in favor of the appellants. Consequently, we affirm the verdicts entered and sentences imposed by the district court.

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*Of the District of Rhode Island, sitting by designation.

Factual Background

I. Evidence of the Drug Importation Conspiracy

Giry and Seward are citizens of, respectively, France and Great Britain. The evidence purporting to show the existence of and their participation in a drug importation conspiracy consists of nine meetings and two telephone calls occurring between February, 1984 and February, 1985. In addition to Giry and Seward, participants in these encounters included Albert Cracoliche ("Cracoliche"), a confidential government informant, and two Drug Enforcement Administration agents ("DEA agents"), William Mitchell ("Mitchell") and Victor Aponte ("Aponte"). Four of the nine meetings took place on American territory — three in Puerto Rico and one in New York City — while the other five meetings took place on various foreign nations' territories in the Caribbean.

The first meeting, which was arranged by Cracoliche, took place on February 16, 1984 in the Dutch West Indies. Present were Cracoliche and his girlfriend, the two DEA agents and the appellants. Cracoliche performed the introductions, then withdrew from the conversation. Agent Mitchell identified himself as a representative of an organization in the New York, Connecticut and New Jersey area that was interested in purchasing 150 kilograms of cocaine for distribution in the New York area. The group discussed the possibility of Giry's and Seward's supplying the 150 kilograms of cocaine. Both Giry and Seward insisted that delivery could not be made on United States territory.

The second meeting took place in Puerto Rico on March 9, 1984. Present were Cracoliche, the two DEA agents and the appellants. The agents first showed Giry $3,000,000 in cash at a local bank, after which they drove to a local hotel for a meeting with both Giry and Seward, dropping off Cracoliche along the way. At the hotel it was agreed that the cocaine and

the cash payment would be exchanged in the French West Indies. This was the last meeting attended by either Seward or Cracoliche. Cracoliche's subsequent involvement was limited to arranging, without attending, the third, fourth, sixth and seventh meetings.

The third through the seventh meetings involved only Giry and the two DEA agents. These five meetings took place between March and October, 1984 and were located in, respectively, Puerto Rico, the Dutch West Indies, Curacao, the Dutch West Indies and Puerto Rico. Discussion at these meetings focused on delays, price increases and quality reductions that Giry claimed were being imposed by his Columbian supply sources. In response to these problems, Giry and the DEA agents reduced the quantity of the prospective purchase from 150 to 135 kilograms of cocaine. At the seventh meeting, Giry told the DEA agents that Seward had been arrested in Connecticut while working on a separate marijuana smuggling operation that Giry had organized.

On October 30, 1984 Giry met with agent Mitchell and another undercover agent at La Guardia Airport in New York. The cocaine price had again increased, and the quantity to be purchased was therefore reduced to 100 kilograms. Giry stated that if Mitchell still objected to the additional price increase, he would pay Mitchell $35,000 and stop the deal. But Mitchell declined this offer, and the parties made plans to consummate the deal within four to six weeks in the French West Indies.

Apparently, on either December 18 or 19, 1984, Giry helped load 100 kilograms of cocaine onto a fishing trawler on the Columbian coast. A U.S. Coast Guard cutter spotted the trawler at sea and gave chase, and the trawler's crew dumped the cocaine overboard. Over a month later, on January 31 and February 1, 1985, Giry telephoned agent Mitchell to arrange another meeting, answering "yes" to Mitchell's question as to whether the cocaine had been lost. These two calls are the

basis of Giry's conviction on the two counts alleging violations of 21 U.S.C. section 843(b).

The ninth meeting, with only Giry and the two agents present, took place on February 3, 1985 in Santo Domingo. Giry explained that he had helped load cocaine onto the boat that had been intercepted the previous December, that the crew had dumped all the cocaine overboard before the Coast Guard boarded the boat, and that his Columbian suppliers still wanted to consummate the 100 kilogram transaction. The next day, agent Mitchell called Giry to a meeting at the Santo Domingo airport. Upon arriving at the airport, Giry was detained, deported to Puerto Rico and arrested by American authorities.

II. The Government's Failure to Produce Cracoliche

On March 26, 1985 Giry filed a motion requesting the court to order the production of the government's confidential informant, whose name was then undisclosed. On June 26, 1985, after an evidentiary hearing, U.S. Magistrate Justo Arenas issued an opinion and order grantinng Giry's motion. The Magistrate found that Albert Cracoliche "participated in the enterprise as an agent of the United States and was neither a tipster nor an observer." Following *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), the Magistrate concluded that the government was required either to produce the informant or to disclose his whereabouts to Giry, and he ordered the government to file within ten days a written report of its efforts to locate Cracoliche.

On July 5, 1985 the government moved for a fifteen-day extension of time to file the required report, stating that Cracoliche was last known to be in France and that diligent efforts to locate him were under way. Thereafter, apparently upon learning that efforts were being made to find him, Cracoliche telephoned agent Aponte. They scheduled an August

20, 1985 meeting in Puerto Rico at which Giry's attorney, James Lawson, could interview Cracoliche. Lawson flew to Puerto Rico on August 19, but was informed by agent Aponte that Cracoliche would not be able to attend the next day's meeting.

On September 23, 1985 the district court held a status conference at which it ordered the government to attempt to contact Cracoliche, to schedule a meeting between Cracoliche and the defense attorneys and to inform the court by September 30 of the government's efforts to carry out these orders. No meeting was arranged, and on September 20 the government filed an "informative motion," consisting of agent Aponte's recitation of efforts made to locate and produce Cracoliche.

Almost five months later, on February 18, 1986, the district court held a hearing on all pending pre-trial motions, which included Giry's motion to dismiss the indictments based on the government's failure to produce Cracoliche. On the same day, the government filed a second informative motion, incorporating and supplementing its first informative motion. As recited in these motions, the efforts made by the government to locate and produce Cracoliche included the following: after the government was first ordered to locate Cracoliche in June, 1985, agent Aponte made inquiries as to Cracoliche's whereabouts through contacts at the French National Police Narcotics Section; apparently as a result of these inquires, Cracoliche telephoned Aponte in August, 1985, and the two scheduled an August 20 meeting in Puerto Rico to which the defense attorney would be invited; on August 19, Cracoliche spoke by telephone with Aponte and refused to travel from the French West Indies to Puerto Rico, expressing fears for his safety; Aponte then explained the situation to defense attorney Lawson, who was unable to travel to the French West Indies at that time; agent Aponte made further attempts to telephone Cracoliche in September, receiving a pre-recorded message in French to the effect that the number was not in service; Aponte

asked Jean Ravenello, a French Liaison Officer in New York, to investigate this last known telephone number of Cracoliche, but received no further leads; and agent Mitchell made two further inquiries through Liaison Officer Ravenello as to Cracoliche's whereabouts, but these were similarly unavailing.

On February 20, 1986 the district court issued a written opinion and order denying Giry's motion to dismiss. The court found, contrary to the Magistrate's finding, "that the informer's participation is more of a conduit than a principal to the enterprise," concluding "that the informant's participation is not so intertwined as movant would like the Court to believe." The district court further found that the government "carried its burden in showing good faith efforts to locate the informer." Finally, the court found that the defendants' sixth amendment right to confront adverse witnesses would not be violated by the unavailability of Cracoliche, both because no statements by Cracoliche would be introduced at trial and because the defendants would have the opportunity to cross-examine both agents Aponte and Mitchell at trial.

Discussion

I. Sufficiency of the Evidence of a Drug Importation Conspiracy

In reviewing the sufficiency of the evidence, "we consider the evidence as a whole, taken in the light most favorable to the government, together with all legitimate inferences to be drawn therefrom, to determine whether a rational trier of fact could have found each defendant guilty beyond a reasonable doubt." *United States v. Drougas,* 748 F.2d 8, 15 (1st Cir. 1984). In conspiracy prosecutions, the evidence must support a rational trier's finding, "beyond a reasonable doubt that each defendant had the specific intent to violate the substantive statute; such proof can be largely circumstantial." *United States v. Hyson,* 721 F.2d 856, 860 (1st Cir. 1983).

It is this latter finding that appellants Giry and Seward challenge. They contend that the evidence introduced at trial was insufficient for a jury to find that they possessed the requisite knowledge and intent for the substantive crime alleged as the objective of their conspiracy. The conspiracy statute under which they were convicted, 21 U.S.C. section 963, imposes criminal liability upon "[a]ny person who attempts or conspires to commit any offense defined" in subchapter II of the Drug Abuse Prevention and Control Act, 21 U.S.C. sections 951-966. The substantive offense found to have been the objective of the appellants' conspiracy, 21 U.S.C. section 952(a), prohibits the "import[ation] into the United States from any place outside thereof" of certain controlled substances, including cocaine.

The appellants argue that they agreed only to import cocaine from Columbia to the French West Indies, and that the final objective of their conspiracy was the consummation of the planned sale to agents Aponte and Mitchell in the French West Indies. Under this theory, the appellants lacked the specific intent to import cocaine into the United States and hence lacked the specific intent to violate the substantive statute.

The problem with this theory is that both Giry and Seward agreed to arrange and carry out the cocaine sale after being told by agents Aponte and Mitchell of the latters' plans to import the cocaine for distribution in the New York area. Giry and Seward argue that the agents' expressed importation plans cannot be imputed to the conspiracy charged in the indictment, for three reasons: first, government agents do not count as co-conspirators; second, the agents never actually intended to import the cocaine into the United States; and third, any genuine importation plans on the part of the appellants' buyers would constitute a wholly separate conspiracy involving only the buyers and perhaps some subsequent purchasers.

[1,2] The appellants' first argument, although true, is irrelevant. The rule that government agents do not count as co-conspirators has relevance only "in situations where the conspiracy involves only [one] defendant and a government informer. In that situation there can be no conspiracy because it takes two to conspire and the government informer is not a true conspirator." *United States v. Martino*, 648 F.2d 367, 405 (5th Cir. Unit A June 1981), *vacated in part on other grounds sub nom. United States v. Holt*, 650 F.2d 651 (5th Cir. July 1981), *cert. denied*, 456 U.S. 943, 102 S.Ct. 2006, 72 L.Ed.2d 465, *and cert. denied*, 456 U.S. 949, 102 S.Ct. 2020, 72 L.Ed.2d 474, *aff'd on reh'g*, 681 F.2d 952 (Former 5th Cir. 1982) (en banc), *aff'd sub nom. Russello v. United States*, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). In the instant case the plurality requirement is satisfied by the participation of two "true" conspirators, Giry and Seward. The participation of government agents therefore does not negate the existence of the conspiracy charged.

[3] The appellants' second argument rests on the fact that the DEA agents never actually intended to import the cocaine into the United States. Since the persons who were to carry out the actual importing never intended to do this essential act, it is argued that the goal of importing the cocaine to the United States cannot be imputed to the conspiracy. But this logic rests on the faulty assumption that an expressed conspiratorial objective is negated by its factual impossibility. On the contrary, "[t]he crime of conspiracy, whether under the drug statute or under the general conspiracy statute, is complete upon the agreement to do an unlawful act as implemented by one or more overt acts. Factual impossibility is no defense." *United States v. Senatore*, 509 F.Supp. 1108, 1110 (E.D.Pa. 1981) (statutory citations omitted); *see also United States v. Jannotti*, 673 F.2d 578, 591 (3d Cir.) (en banc), *cert denied*, 457 U.S. 1106, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982), *aff'd on later appeal*, 729 F.2d 213 (3d Cir.), *cert. denied*,

469 U.S. 880, 105 S.Ct. 243, 83 L.Ed.2d 182 (1984) ("Because an agreement between two or more persons to commit criminal acts poses, in and of itself, a serious danger to social order, it is proscribed by the law of conspiracy . . . It is . . . irrelevant that the ends of the conspiracy were from the very inception of the agreement objectively unattainable." (citations omitted)).

The rule that factual impossibility is no defense has been applied even when the reason for the impossibility is that certain acts essential to the conspiracy's success are to be carried out by individuals who turn out to be government agents. For instance, in *United States v. Seelig*, 498 F.2d 109 (5th Cir. 1974), three government agents made plans to purchase cocaine from Seelig and two other individuals. Seelig and his partners were arrested before the sale was consummated, and all three were indicted and convicted for conspiracy to possess with intent to distribute cocaine. On appeal, Seelig and his partners argued that they could not be held criminally liable for conspiracy to distribute cocaine because their prospective purchasers were government agents who never intended to distribute it. The Fifth Circuit rejected this argument, stating:

> We are also unpersuaded that we should adopt the rationale . . . that a conspiracy conviction cannot result where an "essential" act to the consummation of the substantive offense is to be performed by a government agent. Such an approach, we think, is inconsistent with the basic principle that a conspiracy is proved when it is established that two or more persons agreed to commit an offense and one of them engaged in an overt act in furtherance of the agreement.

498 F. 2d at 112.

[4] Similarly, in *United States v. Rose*, 590 F.2d 232 (7th Cir. 1978), *cert. denied*, 442 U.S. 929, 99 S.Ct. 2859, 61

L.Ed.2d 297 (1979), two government agents made plans with Rose and Peterson for a burglary and subsequent distribution of the stolen goods. The agents were to commit the burglary, and Rose and Peterson were to help sell the stolen goods. The burglary was never in fact committed, but the agents called Rose and Peterson on the pretense that the four should meet to divide up the stolen goods. Rose and Peterson were arrested, indicted and convicted for conspiring to transport in interstate commerce more than $5,000 in goods known to be stolen. On appeal, Rose and Peterson raised the factual impossibility defense, arguing "that a conspiracy . . . cannot exist unless and until someone has stolen the goods the conspirators plan to transport in interstate commerce," 590 F.2d at 235. The Seventh Circuit rejected this argument, reasoning that

> it ignores the nature of the crime of conspiracy, which is an agreement to commit a substantive crime, accompanied by an overt act in furtherance of the agreement. Whether the substantive crime itself is, or is likely to be, committed is irrelevant. . . . All that was necessary, in addition to an overt act, was that the intended future conduct they had agreed upon all the elements of the substantive crime.

590 F.2d at 235. Under the logic of *Rose* and *Seelig*, a conspiracy to import cocaine into the United States can exist even when all the conspirators agree that the task of importation is to be carried out by individuals who turn out to be government agents.

The appellants' third argument asserts that any conspiratorial plans beyond the planned cocaine sale in the French West Indies belong to a wholly separate conspiracy. Accepting *arguendo* that a conspiracy to import cocaine into the United States existed, Giry and Seward argue that this was separate from the conspiracy to import cocaine into the French West Indies, and that they belonged to the latter but not the former

conspiracy. But this argument runs counter to the principles regularly applied by the federal courts in analyzing the structure and divisibility of drug conspiracies.

A scheme to manufacture and distribute a large quantity of illicit drugs involves a great many discrete steps and includes a large number of people, most of whom know few of the other participants in the scheme. Thus one could describe the overall scheme as the sum of many discrete conspiracies to manufacture or distribute illicit drugs. But the federal courts have adopted the opposite view, permitting the entire scheme to the characterized as a single conspiracy and treating each discrete step as one of the links in an indivisible chain. See *United States v. Inadi*, 748 F.2d 812, 817 (3d Cir. 1984), *rev'd on other grounds*, ___ U.S. ___, 106 U.S. 1121, 89 L.Ed.2d 390 (1986) ("[W]here a number of parties combine to manufacture, distribute and retail narcotics there is a single conspiracy — a so-called 'chain' conspiracy — despite the fact that there has been no direct contact whatsoever amongst some of its links."); *United States v. Moosey*, 735 F.2d 633, 635-36 (1st Cir. 1984); *United States v. Warner*, 690 F.2d 545, 549 (6th Cir. 1982); *see also United States v. Jabara*, 618 F.2d 1319, 1327 (9th Cir.), *cert. denied*, 446 U.S. 987, 100 S.Ct. 2973, 64 L.Ed.2d 845, *and cert. denied*, 449 U.S. 856, 101 S.Ct. 154, 66 L.Ed.2d 71, *and cert. denied*, 449 U.S. 856, 101 S.Ct. 154, 66 L.Ed.2d 70 (1980); *United States v. Magnano*, 543 F.2d 431, 434 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091, 97 S.Ct. 1100, 51 L.Ed.2d 536, *and cert. denied*, 429 U.S. 1091, 97 S.Ct. 1101, 51 L.Ed.2d 536 (1977).

It is true that the above cases dealt with domestic manufacturing and distribution chains rather than with networks that crossed the national border. But the underlying reasons for treating each vertical drug network as a single chain apply with equal force to conspiracies that begin outside the border. The characterization of the vertical network as a single chain rests upon the interdependent nature of the enterprise.

Each participant's financial gain depends upon the successful accomplishment of all the illegal links in the chain, from manufacturing, transporting and wholesaling the drugs down to each retail sale on the street. Thus, in

> a "chain" conspiracy, the agreement can be inferred from the interdependent nature of the criminal enterprise. Conspiracies to distribute narcotics, which normally involve numerous sales and resales of drugs until they reach the ultimate consumers, are often "chain" conspiracies. Because the success of participants on each level of distribution is dependent upon the existence of other levels of distribution, each member of the conspiracy must realize that he is participating in a joint enterprise, even if he does not know the identities of many of the participants. Accordingly, a single conspiracy does not become multiple conspiracies simply because each member of the conspiracy did not know every other member, or because each member did not know of or become involved in all of the activities in furtherance of the conspiracy.

United States v. Warner, 690 F.2d 545, 549 (6th Cir. 1982) (citations omitted).

This theory is particularly applicable to the roles assumed by Giry and Seward, i.e., suppliers of a large quantity of cocaine to parties believed to be importers working for a large, domestic distribution network. "[O]ne who deals in large quantities of narcotics may be presumed to know that he is a part of a venture which extends beyond his individual participation . . . 'Thus the conspirators at one end of the chain kn[o]w that the unlawful business would not, and could not, stop with their buyers. . . .'" *United States v. Magnano*, 543 F.2d 431,

434 (2d Cir. 1976) (*quoting United States v. Bruno*, 105 F.2d 921, 922 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257 (1939)).

The appellants cite *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938), in support of the argument that their conspiracy extended no further than the planned sale of cocaine in the French West Indies. Peoni, the defendant in that case, sold countefeit bills to one buyer, who sold them to a subsequent buyer. The subsequent buyer was arrested while trying to pass the bills as real currency. Peoni was convicted on a multiple count indictment that included one count of conspiring with the subsequent buyer to possess the counterfeit bills. The Second Circuit reversed Peoni's convictions, reasoning that "a conspiracy . . . imports a concert of purpose, and . . . Peoni had no concern with the bills after [his own buyer] paid for them . . . Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it. . . ." 100 F.2d at 403.

[5] We are not persuaded that the logic of *Peoni* applies to this case. The rationale of *Peoni* is that a seller of illegal items has no cognizable stake in any subsequent sale of the items. That is, after the manufacturing, importing, and transporting to a terminal point of distribution have been completed, subsequent sales to a myriad of local retailers would not normally be part of the basic conspiracy. Such reasoning bears little relevance to the situation under review here. A large-scale drug wholesaling scheme would not be economically viable but for the wholesaler's acccess to an elaborate distribution and retailing network. In *Peoni*, the Second Circuit indicated neither the scale of the counterfeiting scheme under review nor the positions held by the defendants-appellants therein, and we we no reason for transposing its general language onto a specific class of cases where it would be inapposite. We agree with the Second Circuit, which for similar reasons has

seen fit to disregard its *Peoni* decision in the drug wholesaling context: "[p]recedent within this Circuit abounds for the proposition that one who deals in large quantities of narcotics may be presumed to know that he is part of a venture which extends beyond his individual participation," *United States v. Magnano*, 543 F.2d 431, 434 (2d Cir. 1976).

The appellants also rely on *United States v. Conroy*, 589 F.2d 1258 (5th Cir.), *cert. denied*, 444 U.S. 831, 100 S.Ct. 60, 62 L.Ed.2d 40 (1979), in arguing that their conspiratorial objective encompassed only the importation of the cocaine into the French West Indies. In *Conroy*, a boat carrying marijuana destined for the United States was seized, and its crew were indicted and convicted for conspiring to import the drugs. Walker, one of the crew, contended that he thought the cargo was destined for Canada. Although the Fifth Circuit held that sufficient evidence had been introduced for a jury to disbelieve Walker's contention, the court stated in dictum, "if it be assumed that Walker indeed planned only to cooperate in the export of marijuana to *Canada*, there would be no criminal intent on his part cognizable in an American court . . .," 589 F.2d at 1270 (emphasis in original). This dictum is irrelevant to the case *sub judice*, because uncontradicted evidence shows that agents Aponte and Mitchell represented themselves as intermediaries working for a large drug distribution network in the greater New York area. In addition, the agents unsuccessfully sought to have the appellants agree to a delivery on American territory; the agents brought Giry to a Puerto Rico bank, where he was shown three million American dollars that were to finance the deal; and the negotiations involved four meetings on American territory — three in Puerto Rico and one in New York. Taken together, this constitutes more than sufficient evidence to prove beyond a reasonable doubt that the appellants knew they were supplying drugs for importation and distribution in the United States.

[6] We believe that our decision in *United States v. Cordero*, 668 F.2d 32 (1st Cir. 1981), is controlling here. In that case, a DEA agent made plans with a pilot named Sorren to smuggle cocaine into the United States. Sorren brought Cordero into the deal, to supply the drugs that Sorren planned to fly into the United States. Sorren and Cordero appealed their convictions, arguing that they belonged to separate conspiracies. Cordero maintained "that there is no evidence that she knew the drugs were bound for the *Commonwealth of Puerto Rico* or anywhere else within the customs territory of the United States." 668 F.2d at 38 (emphasis in original). In affirming Cordero's and Sorren's convictions, we rejected the argument

> that there is inadequate evidence for a jury to find that they engaged in a single conspiracy to import cocaine into Puerto Rico . . . [Cordero] knew that Sorren, along with Turner, was to transport the cocaine to Puerto Rico . . . Cordero and Sorren each knew of the other's role in the enterprise and each knew that the other's role was essential for the success of the enterprise.

668 F.2d at 41-42.

[7] It is true that the importing in the instant case was to be carried out by a government agent rather than by a genuine co-conspirator. But this is a distinction without significance, where the evidence establishes that each defendant knew of the overall scheme, had a stake in it, and did his part to make it succeed. *See, United States v. Seelig*, 498 F.2d 109 (5th Cir. 1974), and *United States v. Rose*, 590 F.2d 232 (7th Cir. 1978), discussed at length *supra*. As the Seventh Circuit concluded in a nearly identical case, the fact that "only the DEA agents were involved in importing the cocaine" does not shield the seller from liability "as a conspirator in the importation," *United States v. Schmucker-Bula*, 609 F.2d 399, 401 (7th Cir. 1980). There, as here,

> [T]he evidence is more than sufficient to show the intent of the defendant[s] . . . to further the purpose of the buyers to import the cocaine . . . [T]he agents informed the conspirators of their plan to smuggle the cocaine into the United States. With this knowledge of the agents' purpose . . . the conspirators knowingly encouraged and arranged the transportation of drugs that would end in the United States . . . [T]he defendants cannot escape liability merely because the purchasers took primary responsibility for the smuggling arrangements.

609 F.2d at 401-402.

II. Consequences of the Government's Failure to Produce the Confidential Informant Albert Cracoliche

The appellants argue, based upon *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), and its progeny that the government's failure to produce Cracoliche deprived them of a fair trial. They contend that Cracoliche's testimony was critical "to the defense that there was no intent toward the United States" and "to their entrapment/due process defense . . .," appellant's brief at 28. The gist of the proffered entrapment defense is that the appellants were intimidated into going along with the deal by agents Aponte's and Mitchell's "implication of themselves as dangerous mobster-types with an 'organization' and 'Atlantic City connections,'" *id.* at 33, Cracoliche could testify "that Giry really wanted out of the cocaine picture and was persistently trying to extricate himself without injury or offense that might trigger retaliation of some sort from these Atlantic City-connected cocaine Mafiosos . . .," *id*, at 35.

Whether the government has a duty to disclose the names and whereabouts of its confidential informants "depend[s] on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible

significance of the informer's testimony, and other relevant factors." *Roviaro v. Untied States*, 353 U.S. 53, 62, 77 S.Ct. 623, 629, 1 L.Ed.2d 639 (1957). When this duty to produce names and addresses attaches, the government is required "to produce correct information or at least to have exercised diligence reasonable under the circumstances to locate the informer," *United States v. Davila Williams*, 496 F.2d 378, 382 (1st Cir. 1974). In the case below, the district court held a pre-trial hearing to consider, among other matters, defendant Giry's motion to dismiss the indictments based upon the government's failure to locate Cracoliche. The district court denied the motion, finding both that Cracoliche was not a critical witness and that the government had carried its burden in showing good faith efforts to locate Cracoliche. We do not find error in this application of the factors enunciated in *Davila Williams, supra*.

[8] We find ample support for the district court's conclusion that Cracoliche was not a critical witness. Cracoliche attended the first meeting and part of the second meeting, but did not participate in any of the negotiations. His only other involvement was to arrange, without attending, the third, fourth, sixth and seventh meetings. The district court correctly concluded that Cracoliche served as "more of a conduit than a principal to the enterprise." His role was not of a kind that readily triggers the government's duty to disclose. *Cf. United States v. Alonzo*, 571 F.2d 1384, 1387 (5th Cir.), *cert. denied*, 439 U.S. 847, 99 S.Ct. 147, 58 L.Ed.2d 149 (1978) ("It is well settled that the government is not required to disclose the identity of an informant who is a mere tipster and not an active participant in the offfense charged even though he was present during the transaction in question.").

The appellants nevetheless maintain that Cracoliche's account of his few conversations with Giry would have provided significant exculpatory evidence. The appellants fail to specify

how such testimony would have supported their alleged defenses, i.e., lack of specific intent and entrapment. They contend that a specific offer of proof as to Cracoliche's testimony is precluded by their inability to interview Cracoliche.

[9] We agree that the appellants cannot be expected to submit a detailed proof offer regarding a witness they have been unable to interview. But this does not relieve them from having to provide at least some explanation of how Cracoliche's testimony would have supported their alleged defenses. *Cf. United States v. Skeens,* 449 F.2d 1066, 1070 (1971) ("[S]peculation . . . is not sufficient to meet the heavy burden which rests on an accused to establish that the identity of an informant is necessary to his defense."). The appellants' first defense, that they lacked specific intent to import cocaine, is untenable so long as uncontroverted evidence shows that they knew of their buyers' importation plans from the outset of the conspiracy. To render the defense tenable, Cracoliche would have had to testify that the DEA agents did *not* represent themselves as intermediaries for an American distribution network. But the appellants make no such claim regarding Cracoliche's testimony. Nor could they make such a claim, in light of their second defense, which postulates the appellants' entrapment by the DEA agents' "implications of themselves as dangerous mobster-types with an 'organization' and 'Atlantic City connections,'" appellants' brief at 33.

A similar problem arises with respect to the entrapment defense. "Before a defendant is entitled to have the jury consider the issue of entrapment, he must offer some evidence, amounting to more than a scintilla, that he lacked a predisposition to commit the offense." *United States v. Kakley,* 741 F.2d 1, 3 (1st Cir.), *cert. denied,* 469 U.S. 887, 105 S.Ct. 261, 83 L.Ed.2d 197 (1984). In this case, convincing evidence of the appellants' predisposition to engage in drug importing was provided by agent Mitchell's testimony about the seventh

meeting with Giry. According to Mitchell, Giry told the agents that he had recently sent four boatloads of marijuana into the United States, and that co-conspirator Seward had been arrested when one of the boats was seized in American waters, trial transcript ("transcript") at 109-110. To challenge such compelling evidence of predisposition, Cracoliche would have had to testify that Giry never made such statements, or at least that Giry was lying to Mitchell when he made those statements. But the appellants never proposed to offer Cracoliche for this purpose. Rather, Cracoliche allegedly would have testified "that Giry really wanted out of the cocaine picture and was persistently trying to extricate himself," appellants' brief at 35. It is questionable whether this theory negates Mitchell's testimony showing Giry's predisposition. Even if it did, Cracoliche's testimony would have been largely, if not entirely, cumulative on this point. The facts that allegedly show Giry's extrication attempts — Giry's repeated reports of increases in the manufacturers' prices, and his offer to cancel the deal at $35,000 at the eighth meeting — were already put before the jury by other witnesses.

[10] These considerations lead us to doubt whether disclosure of Cracoliche's identity and whereabouts would have been required under *Roviaro v. United States, supra*. Assuming that disclosure was required, however, we cannot find that the government's failure to produce Cracoliche deprived the appellants of a fair trial under the standards of *Roviaro*. As this court pointed out in *United States v. Davila Williams, supra:*

> the government's duty under *Roviaro* to produce names and addresses requires it to produce correct information or at least to have exercised diligence reasonable under the circumstances to locate the informer . . . How far it must go to keep track of, or search for, an informer . . . depends on many factors including the extent of the gov-

> ernment's control over the witness, the importance of the witnesses's testimony, the difficulty of finding him, and similar matters.

496 F.2d at 382.

In this case, the informant was a French citizen who never resided in the United States, whose physical address was never known to the government and whom government agents were able to reach only by telephone. Opinion and Order of February 20, 1985 at 3, *reprinted in* Appendix for Defendants/Appellants, Volume I at A408, A410. The government's efforts to locate and produce Cracoliche included inquiries through the French National Police, a planned meeting in Puerto Rico from which Cracoliche allegedly backed out at the eleventh hour, further attempts to reach him by telephone and subsequent inquiries through a French Liaison Officer in New York. Nothing in the record indicates that the government had any contact with Cracoliche apart from these attempts to locate him for the trial of Giry and Seward.

Were Cracoliche demonstrably important to the appellants' presentation of their defense, we might have found, under *Davila Williams,* that the government failed sufficiently to keep track of the informant in the months following Giry's arrest. But where, as here, the record indicates that the informant's testimony is relatively unimportant, and that the government neither controlled his whereabouts nor otherwise dealt with him, we cannot say that the district court erred in finding these efforts to have been sufficient. Under the circumstances of this case, the government's failure to produce its confidential informant for trial did not amount to a violation of *Roviaro.*

III. Whether the Prosecutor's Closing Argument Deprived the Appellants of a Fair Trial

The appellants allege a number of improprieties in the prosecutor's closing argument and contend that these deprived

them of a fair trial. Three types of improprieties are alleged. First, the appellants contend that one of the prosecutor's arguments constituted an improper comment on their failure to testify. Second, the appellants point to five comments by the prosecutor that allegedly misstated the law and prejudicially inflamed the jury. Third, the appellants contend that the prosecutor argued facts not in evidence.

A. *Comment on the defendants-appellants' failure to testify*

In closing argument, the prosecutor stated, "the defense during the opening argument told you that this man was subjected to a lot of pressures. The evidence is to the contrary." Transcript at 396. Later in his closing, the prosecutor stated,

> It has been suggested to you by Mr. Lawson that Mr. Giry was put under a lot of pressure by the agents who called themselves mafia. What pressure is there? . . . Nobody put a gun in his back. Nobody pushed him. He was there out of his own volition and so was Mr. Seward.

Transcript at 425.

The appellants argue that these statements amount to improper comment on their failure to testify. They reason that Cracoliche was the only person other than themselves who could have presented evidence of the pressure applied by the DEA agents. Thus, with Cracoliche unavailable, any comment that evidence of pressure is lacking amounts to a comment upon the appellants' failure to testify.

[11] We do not find the appellants' reasoning persuasive. The evidence upon which the appellants rest their claim of having been pressured consists of the following: the DEA agents' representations of themselves as big-time mobsters, and their insistence on going ahead with the deal in spite of Giry's alleged extrication attempts, i.e., Giry's reports of time delays and price increases and his offer to pay $35,000 to

cancel the deal. There is no variance between the appellants' evidence and the prosecution's evidence on this issue, nor have the appellants specified any variance that would have resulted from either Cracoliche's or Giry's testimony. The argument as to whether the appellants were pressured thus consists of a dispute over the proper inferences to be drawn from a single set of facts.

Viewed in this light, the prosecutor's statements about the lack of evidence of pressure cannot be deemed commentary on the defendants-appellants' failure to testify. *See United States v. Maccini*, 721 F.2d 840, 843 (1st Cir. 1983) (prosecutor's argument held not violative of the defendant's fifth amendment privilege against self-incrimination where "the language does not 'naturally and necessarily' comment on [the] accused's failure to testify" (citation omitted)). To hold otherwise would in effect prohibit prosecutors from arguing about the inferences to be drawn from uncontested evidence whenever a defendant asserted in wholly conclusory fashion that an unavailable witness's testimony would support a contrary inference. We decline to adopt such a rule in this case, and we therefore hold that the prosecutor's statements about the lack of evidence of pressure fell within the permissable range of closing argument tactics.

B. *Misleading and inflammatory comments*

The appellants allege that five comments by the prosecutor misstated the law of conspiracy and prejudicially inflamed the jury. All of the cited comments are from the prosecution's argument that Giry and Seward had the specific intent to commit the substantive crime of importing cocaine. The most egregious comment concerned Giry's third meeting with the agents in Puerto Rico. Arguing that this negated Giry's denial of the specific intent to import, the prosecutor stated, "[s]ounds like Peter who for the third time denied Christ," transcript at

396. In other improper commentary, the prosecutor called the appellants "cowards" for refusing to deliver the cocaine on American territory and admonished the jury that, if the appellants willfully agreed "to sell that cocaine so it could be imported into the United States, then you must not assuage them for being cowards," transcript at 427. Two other comments criticized by the appellants compared their roles in the importation conspiracy with other kinds of criminal conduct. One such comment compared Giry to a person who throws a stone into a crowd, injuring a particular individual, then denies having the "intention of hitting that man in particular," transcript at 397. The other analogy compared the appellants to two individuals who "agree to kill the Judge," with one furnishing money for a gun, the other purchasing the gun, and both lying in wait until the Judge appears: then, if "when you fire, the weapon is no good because it was defective, that doesn't mean there was no conspiracy," transcript at 426. The fifth comment cited by the appellants consist of references to a separate scheme to smuggle four boatloads of marijuana into the United States. In conversation with the DEA agents, Giry claimed to have organized the scheme and said that Seward had been arrested when the Coast Guard intercepted one of the boats, transcript at 397.

[12, 13] Of the five comments cited in their brief, the appellants objected contemporaneously to none and objected at the close of argument only to the example of a conspiracy to kill the judge, trancript at 453-55. The appellants' failure to object to the other four comments at trial precludes their consideration on appeal absent a showing of plain error. Fed.R.Crim.P. 52; *United States v. Fuller*, 768 F.2d 343, 347 (1st Cir. 1985); *see also United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 1047, 84 L.Ed.2d 1 (1985) ("[T]he plain error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice

would otherwise result.'" (citation omitted)). Of the four comments to which no objection was taken, we believe that only the reference to Peter's denial of Christ conceivably imparted such prejudice as to warrant further discussion under the plain error standard. Accordingly, we confine our review here to this comment and to the analogy drawn between the appellants' conduct and a plot on the judge's life.

[14] There is no question that these comments were improper. The prosecutor's reference to a plot on the judge's life improperly likened the appellants' conduct to a violent attack upon the court. The prosecutor's reference to Peter's denial of Christ constituted an irrelevant and inflammatory appeal to the jurors' private, religious beliefs. Such comments warrant especial condemnation when uttered by the government's attorney, whose duty is as much "to refrain from improper methods calculated to produce a conviction as it is to use every legitimate means to bring about a just one," *Berger v. United States,* 295 U.S. 78, 88 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

[15, 16] However, the issue here does not turn on whether the government acted improperly. Rather, the question is whether the trial "was so prejudiced by the prosecutor's misstatements as to affect its outcome, or to warrant a sanction for the purpose of deterring future prosecutorial misconduct," *United States v. Maccini,* 721 F.2d 840, 846 (1st Cir. 1983) (citations omitted). To answer this question, a three-step inquiry is employed: "(1) whether the prosecutor's conduct was isolated and/or [less than] deliberate, (2) whether the trial judge's instructions were strong and explicit, and (3) whether it is likely that any prejudice that survived the judge's instructions could have affected the outcome of the case," *Maccini, supra,* 721 F.2d at 846. On the first step of the inquiry, deliberateness is less likely to be found where the impropriety appears to have been provoked by inflammatory argument on the part of opposing counsel. *Id.* at 846-47. On the third step

of the inquiry, prejudice that survives the charges is deemed less likely to have affected the outcome of the trial where strong evidence supports the prosecution's case, *id.* at 847; *cf.* 3A Wright, Federal Practice and Procedure § 854 at 305 ("Perhaps the single most significant factor in weighing whether an error was harmful is the strength of the case against the defendant." (citations omitted)).

Here, the prosecutor's improper statements appear to have been deliberate. They were relatively isolated incidents, but they were wholly unprovoked. The complete irrelevance of the reference to Peter's denial of Christ suggests that its sole purpose was to inflame the jury's passions.

However, the judge's instructions to the jury at the close of the argument were strong and explicit. The instructions thoroughly addressed each of the issues that may have been clouded by the prosecutor's misstatements. At the outset, the court made clear that "[t]he statements and arguments of counsel are not evidence in the case," and instructed the jury "to consider only the evidence in the case," transcript at 430. *Cf. Maccini, supra,* 721 F.2d at 847 (finding the impact of prosecutorial misstatements mitigated by instructions telling the jury, among other things, to "[b]ear in mind that arguments of counsel . . . are not evidence").

The court gave a strong charge about the presumption of innocence and about the defendants' privilege not to testify, stressing more than once that no adverse inferences may be drawn from their failure to testify, transcript at 432-33. More important, the court gave very clear and comprehensive instructions about the separate elements of conspiracy that must be proved beyond a reasonable doubt before guilt can be found, including, the agreement to commit a substantive crime, willful membership in the conspiracy, the commission in furtherance of the agreement of at least one of the overt acts charged in the indictment, and specific intent to commit the substantive

crime, transcript at 438-45. Also, consistent with Fed.R.Evid. 404(b), the court gave a thorough instruction confining the evidence of a separate marijuana-smuggling scheme to the issue of whether each defendant possessed the specific intent to import cocaine, transcript at 447-48.

[17] In sum, the judge's instructions were sufficiently strong and explicit to have significantly reduced the prejudicial impact of the prosecutor's misstatements. It is possible that the instructions did not entirely neutralize the prejudice. But given the unambiguous evidence of the appellants' intent to supply a large quantity of cocaine to ostensible domestic importers, we do not find that any surviving prejudice could have affected the outcome of the trial.

C. *Arguing facts not in evidence*

[18] The appellants contend that the prosecutor argued facts not in evidence when he said, "[t]hey agreed among themselves and among other persons to sell that cocaine so that in turn it could be brought to Puerto Rico," transcript at 426. The appellants argue that this comment was improper because "[t]here is no evidence that there was any agreement to sell that in any respect hinged on a further importation into the United States or into any particular place," appellants brief at 47. Here the appellants are plainly wrong. By the terms of their own proffered entrapment defense, the appellants planned to sell cocaine to agents posing as importers for a large, domestic distribution network. The real error in the cited comment, which the appellants do not mention, is that the apparent destination of the cocaine was New York, not Puerto Rico. The appellants made no contemporaneous objection to this inaccuracy, and we see no plain error in the court's omission to give a curative instruction on this point.

IV. Whether the District Court Applied the Appropriate Penalty Statute in Setting Giry's Prison Term

[19] On April 30, 1986 the district court sentenced Giry to serve a 20-year prison term and to pay a $200,000 fine for his role in the conspiracy to import cocaine, and to a total of eight years in prison and $50,000 in fines for the two counts of using communication facilities to effectuate the conspiracy. In sentencing Giry to 20 years' imprisonment and a $200,000 fine on the conspiracy count, the district court relied on a legislative amendment to the relevant penalty statute, 21 U.S.C. section 960(b)(1). The amendment was enacted on October 12, 1984, almost ten months after the first meeting among the appellants and the DEA agents, but almost four months prior to Giry's arrest. Because Giry's sentence exceeded the maximum penalties allowed by the unamended version of the statute, Giry argues that his sentence is prohibited by the *ex post facto* clause of the constitution, Article I, Section 9, cl. 3. We find no merit in this argument.

A conspiracy to commit a substantive offense proscribed by subchapter II of the Drug Abuse Prevention and Control Act, 21 U.S.C. sections 951-966, is punishable by the same penalties applicable to the substantive offense that forms the conspiracy's object, 21 U.S.C. section 963. Having been convicted for conspiracy to import cocaine, Giry was subject to sentencing under 21 U.S.C. section 960(b)(1), which prescribes penalties for, among other offenses, the importation of cocaine. Prior to its amendment on October 12, 1984 section 960(b)(1) set the maximum penalty at imprisonment for fifteen years and/or a fine of $25,000. As amended, the statute raised these maxima for certain drug offenses to imprisonment for twenty years and/or a fine of $250,000. The importation of a kilogram or more of cocaine was one of the offenses covered by these enhanced penalties, *see* 21 U.S.C. section 960(b)(1)(B).[1]

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[1] In their reply brief, the appellants cite section 960(b)(1)(A) for the proposition that the enhancement provision expressly excludes crimes involving coca

Giry's sentence on the conspiracy count falls within the maxima allowed by the amended version of the penalty statute. The only question is whether a statutory amendment that become effective during the running time of a conspiracy is applicable to members whose participation in the conspiracy began before that date. Giry's contention that such application of the amendment violates the constitution rests on an overexpansive reading of the *ex post facto* clause. The *ex post facto* clause prohibits any law "which makes more burdensome the punishment for a crime, *after* its commission," *Beazell v. Ohio,* 269 U.S. 167, 169, 46 S.Ct. 68, 68, 70 L.Ed. 216 (1925), *quoted in Dobbert v. Florida,* 432 U.S. 282, 292, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977) (emphasis added). Here, by contrast, the amendment had the effect of increasing Giry's penal liability *during* the conspiracy's commission. "[B]ecause conspiracy is a continuing crime, a statute increasing the penalty for a conspiracy beginning before the date of enactment but continuing afterwards does not offend the Constitution," *United States v. Baresh,* 790 F.2d 392, 404 (5th Cir. 1986); *see also United States v. Campanale,* 518 F.2d 352, 365 (9th Cir. 1975), *cert. denied,* 423 U.S. 1050, 96 S.Ct. 777, 46 L.Ed.2d 638 (1976) ("It is well established that a statute increasing a penalty with respect to a criminal conspiracy which commenced prior to,

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leaves, reply brief at 13. Subsection (b)(1)(A) makes the enhanced penalties applicable to drug offenses involving "100 grams or more" of all Schedule I and II controlled substances "other than a narcotic drug consisting of (i) coca leaves. . . ." Subsection (b)(1)(B) makes the enhanced penalties applicable to drug offenses involving "a kilogram or more of any other narcotic drug in Schedule I or II." Cocaine and other coca leaf derivatives are Schedule II controlled substances, *see* 21 U.S.C. section 812(c), Schedule II, (a)(4). The combined effect of subsections (b)(1)(A) and (b)(1)(B) is to distinguish coca leaf derivatives from other Schedule I and II drugs with respect to the quantity threshold that triggers the enhanced penalties: a kilogram is required for cocaine and other cocaine leaf derivatives, whereas 100 grams suffices for the other Schedule I and II drugs. Here, the appellants were convicted of conspiracy to import 135 kilograms of cocaine, which far exceeds the relevant quantity threshold for enhanced penal liability.

but was continued beyond the effective date of the statute, is not *ex post facto* as to that crime."). We therefore, find no *ex post facto* clause violation in Giry's sentencing.

The judgments of conviction and sentences entered by the district court are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1487

UNITED STATES,
Appellee,

v.

PIERRE MICHEL HENRI GIRY and STEVEN SEWARD,
Defendants, appellants.

Before

CAMPBELL, *Chief Judge*,
COFFIN, BOWNES, BREYER, TORRUELLA and SELYA,
Circuit Judges, and PETTINE,* *Senior District Judge*,

ORDER OF COURT

Entered: June 9, 1987

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court,
Francis P. Scigliano, Clerk.

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*Of the District of Rhode Island, sitting by designation.